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In Celebrating Our Liberties, Think of Those We're Losing

By Mark H. Lynch

A SOBERING REMINDER for this July 4 weekend: Over the past decade, the federal courts have quietly relinquished their responsibility to protect civil liberties whenever the government invokes "national security."

Indeed, if the government taps your phone, breaks into your house, opens your mail or places an informer in your office in the name of national security, the chances are slim today that the courts will do anything to protect your rights. There is even reason to fear that the reluctance of judges to impose prior restraints on the press is eroding — that if the Pentagon Papers case arose today, the government would succeed in its effort to suppress that history of U.S. involvement in Vietnam.

A nation founded on individual rights and a suspicion of central power would do well to note this remarkable development.

In a 1972 case restricting warrantless wiretapping, for example, the Supreme Court wrote that "our task is to examine and balance the basic values at stake in this case: the duty of government to protect the domestic security, and the potential danger posed by unreasonable surveillance to individual privacy and free expression." But by 1981 the High Court was not so concerned about individual rights. "It is 'obvious and unarguable,' " it wrote, "that no governmental interest is more compelling than the security of the nation."

If this were not enough, the courts have also abdicated their responsibility to seriously *examine* national security claims. The rationale here is that the executive branch deserves "utmost deference" in national security matters.

This notion rests heavily on judges' insistence that they are incapable of understanding national security matters and therefore must yield to the executive branch.

The courts, of course, have not always claimed such incompetence for themselves. In 1972, for instance, the Supreme Court rejected a government argument that "internal security matters are too subtle and complex for judicial evaluation." In that opinion, Justice Lewis Powell said that since "courts regularly deal with the most difficult issues of our society, there is no reason to believe that federal judges will be insensitive to or uncomprehending of the issues in domestic security cases."

Since 1976, however, decisions in a score of cases have rejected judicial competence in national security matters.

Consider, for example, a 1978 ruling by the U.S. Court of Appeals for the District of Columbia. It involved the National Security Agency's former practice of intercepting — without judicial warrants — the international telephone calls and telegrams of American citizens to gather information on the civil rights and antiwar movements. As revealed in Senate investigations, the agency targeted some 1,200 U.S. citizens.

When likely targets sued, in a case called *Halkin v. Helms*, , the secretary of defense claimed that it would harm national security to confirm or deny whether NSA had intercepted any of their messages. The appeals court found that this assertion of the "state secrets" privilege was entitled to "utmost deference." Since there could be no public acknowledgement that any plaintiff's messages had been intercepted, the court simply dismissed the case.

In another portion of *Halkin*, the plaintiffs challenged a CIA surveillance program aimed at the antiwar movement. Despite a 1947 law barring it from conducting intelligence operations in the United States, the CIA had infiltrated domestic organizations. It also had tracked movements and contacts of U.S. activists abroad, and documents in the case indicated that the CIA used foreign security services to conduct electronic surveillance and burglary operations against U.S. citizens.

Despite this general evidence, the trial and appeals courts upheld the government's state-secrets privilege to withhold evidence regarding specific plaintiffs. Without this information, the courts refused to rule on the legality of the CIA operation. Again, case dismissed.

Other challenges to NSA's operations have also foundered on the state-secrets privilege. Harrison Salisbury, a veteran foreign correspondent and an editor with The New York Times, learned under the Freedom of Information Act that NSA had reports about him derived from intercepted foreign communications. But NSA refused to disclose whether the intercepted messages were Salisbury's or someone else's.

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Because of the enormous volume of messages Salisbury had sent to and from places such as Russia, China and North Vietnam during his 30 years as a journalist, it seemed likely that at least some of the intercepted messages were his. And an admission that NSA had intercepted at least one of thousands of Salisbury messages would not seem to reveal anything of value to our adversaries.

But it was no go. NSA again asserted the state-secrets privilege, and both the trial and appeals courts sustained the claim.

In a third NSA case, even though the government *admitted* intercepting the plaintiff's messages, the court still threw the case out. Abdeen Jabara, a U.S. citizen of Arab descent, learned that the FBI was conducting surveillance of his affairs because of his involvement in Arab causes; although his activities were perfectly legal, the government suspected he was involved with Mideast terrorists. The FBI disclosed that in 1971 it had asked NSA to intercept Jabara's overseas messages and that NSA had supplied it with summaries of six communications.

But the U.S. Court of Appeals for the Sixth Circuit ruled that since the *technology* used to select a particular individual's messages is secret, it could not decide if use of that technology violated the Fourth Amendment.

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Since the courts have been unwilling to protect the constitutional rights of ordinary citizens when they collide with assertions of national-security interests, can the press expect any better treatment?

Although the First Amendment gives the press great protection from prior restraints, that protection is not absolute. In the 1931 case of *Near v. Minnesota*, the Supreme Court said that "the chief purpose" of the First Amendment is to "prevent previous restraints upon publication." But the court also stated that there is a war-time exception to the prohibition on prior restraints. "No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of transports or the number and location of troops."

The court did not flesh out the contours of this exception until the Pentagon Papers case in 1971, and even then the results were unclear. By a vote of 6 to 3, it ruled that the government could not enjoin publication of documents containing a detailed history of our involvement in Vietnam. The unsigned, three-paragraph decision simply held that the government had failed to carry the "heavy burden of showing justification for the imposition of such a restraint."

Of the separate opinions written by each justice, the pivotal ones were those of Justices Stewart and White. They agreed that publication would do "substantial damage," but they could not conclude that it would "surely result in direct, immediate and irreparable damage" to the nation. Since then, lawyers and legal scholars generally have agreed that the Supreme Court will enjoin the press only if it can be shown that publication will "surely" cause "direct, immediate and irreparable damage" to national security.

There is a popular tendency to assume that the government made a weak case in the Pentagon Papers suit because the documents were historical and had little relevance to continuing operations. But the secret transcripts and briefs in the case — which have been declassified in response to FOIA requests — reveal that this picture is inaccurate. In fact, the government made very serious allegations.

Deputy Undersecretary of State William B. Macomber told District Judge Gehard A. Gesell that "there are people in other governments who would be killed today if some of this information was released." The solicitor general told the Supreme Court that publication would close channels of communication that could end the war and bring POWs home, and that the papers identified active CIA agents and sensitive NSA operations.

That the press won in the face of such grave allegations makes its victory all the more remarkable. But what would happen if the government made such claims today? Subsequent cases involving prior restraint, as well as the judicial treatment of national security issues in other cases, do not bode well for the press.

The first tests of the prior restraint doctrine following the Pentagon Papers case arose on favorable terrain for the government. They involved former CIA employes who wrote books about the agency.

These are not pure press cases since the authors acquired their information through government employment rather than through journalistic or scholarly means. Nonetheless, they do involve substantial First Amendment interests, and they reveal a judicial attitude that is not encouraging to the press.

In 1972 the CIA obtained a court order enjoining former CIA official Victor Marchetti from publishing a book — containing what it considered classified material — until he submitted it to the CIA for deletion of all such information. The agency relied on a secrecy agreement Marchetti had signed as a condition of employment, an agreement including a prepublication review commitment.

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The U.S. Court of Appeals for the Fourth Circuit did rule that Marchetti was entitled to judicial review of the CIA's deletion decisions. But in one of the earliest uses of the "utmost deference" standard, the court added that the review should be limited to whether the censored information had been stamped "classified" — not whether the classification was reasonable. In other words, Marchetti's right to challenge CIA classificatons was meaningless.

The next national security censorship case involved Frank Snepp, a former CIA employe who wrote a highly critical account of the final days of U.S. involvement in Vietnam. In this instance, the CIA did not allege that Snepp's book contained any classified information. Instead, it argued that prepublication review is essential to ensure that former employes don't inadvertently disclose classified information, for only the CIA is capable of determining what is classified. Without prepublication review, the CIA argued, foreign sources and intelligence services would refuse to provide information to the agency.

The court rejected Snepp's argument that prepublication review violates the First Amendment in a brief footnote that was devoid of any effort to reconcile the competing policies. "The government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service," the court wrote. "The agreement that Snepp signed is a reasonable means for protecting this vital interest." The court underscored its cavalier attitude toward the First Amendment issues by rendering its decision summarily without the benefit of full briefs or oral argument.

"Compelling interest" is a term of art to identify interests that outweigh First Amendment values. Although *Snepp* involved CIA control over former employes, the court's identification of the government's interest in protecting the "appearance of confidentiality" of national security information as a compelling interest is a time bomb that could explode in a First Amendment case involving any party, including the press.

The courts have not confined bad law on national security and the First Amendment to cases involving ex-CIA employes.

In 1979, the government persuaded a federal judge in Milwaukee to enjoin The Progressive magazine from publishing an article that described how the hydrogen bonb works. The author, Howard Morland, wrote the article solely on the basis of publicly available materials. His purpose, he said, was to demonstrate that the secrecy surrounding the bomb is a myth.

Although the government dropped the case when another magazine published substantially the same information, the government's success in the district court indicates that the Pentagon Papers standard may not be all that it's cracked up to be.

The government based its case on affidavits from government officials who said that publication would cause irreparable damage. Their argument was not that a terrorist could use the article to build a bomb in his basement, for constructing a thermonuclear weapon requires a complex and highly developed industrial base. Instead, they argued that the article might provide a theoretical missing link to nations searching for the secret to the bomb, that this theoretical windfall would shorten the time in which such a country otherwise might make a bomb, and that publication thus might contribute to the proliferation of thermonuclear weapons.

This argument, though certainly serious, did not allege anything like the sure, direct and immediate harm alleged in the Pentagon Papers case. Yet the trial judge readily agreed that the government had made a sufficient case to enjoin The Progressive.

Further erosion of the Pentagon Papers standard appeared in the early days of the Iranian hostage crisis, when angry crowds were attacking Iranian demonstrators on the streets of Washington. In response to this situation, President Carter banned all demonstrations throughout the city.

When the government denied a parade permit to a group of U.S. and Iranian students who wanted to demonstrate friendship and tolerance between Americans and Iranians, the students filed suit against the presidential ban. Although there are obvious distinctions between parades and publications, the First Amendment protects both, and much of the prior restraint doctrine applies to political demonstrations.

Undersecretary of State Warren Christopher testified that any demonstration concerning Iran might provoke attacks on Iranians which the D.C. police might not be able to control. This violence, Christopher said, might be filmed by TV cameras and might be televised in Iran, where it might be seen by the militants occupying the embassy, who might then retaliate against the hostages.

This no doubt was a sincere argument, particularly in the delicate circumstances of that period. But it was based on a series of speculative contingencies that did not measure up to the sure, direct and immediate standard of the Pentagon Papers case. District Judge Aubrey Robinson promptly ruled that the government failed to make a case for restraining the students' demonstration.

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On appeal the government modified the ban from its original city-wide scope to a ban on demonstrations in Lafayette Park and the White House sidewalk. It argued that the Christopher scenario was valid if filmed violence against Iranians with the White House in the background should reach the embassy in Tehran. A three-judge panel upheld the ban on demonstrating in Lafayette Park.

In both the H-bomb and the Iranian demonstration cases, the government alleged harm that was clearly irreparable — proliferation of thermonuclear weapons and injury to the hostages. Whether those results would surely, directly and immediately follow from the speech that was suppressed was much less clear. But the same point can be made about the Pentagon Papers case. The harms alleged there were grave and irreparable, but a Supreme Court majority was not convinced the harm would follow surely from publication.

We are not likely to see such a display of either skepticism toward national security arguments or faithfulness to the First Amendment in the present judicial climate. Indeed, court developments since the Pentagon Papers decision suggest that the government would have a strong chance of winning an injunction if the case arose today.

So long as the courts defer to the government and accept national security as the paramount national interest, no individual's constitutional rights are safe. It may be that if the courts are against presented by an abuse of power on the scale of Watergate or an issue of such intense national debate as our involvement in Vietnam — or if they become convinced that government officials have begun to lie to them — they would again adopt a critical attitude toward national security arguments and attempt to reconcile civil liberties with national security. But if such occassions arise, they courts will face a substantial body of bad precedent.

In the meantime, less dramatic — though no less serious — violations of civil liberties will go unremedied. That's worth pondering on July 4.

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